

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE

and

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION**

Case No. 4
Claim of J. W. Vaughn
Formal Reprimand -
Failure to Comply
with Track Stability
Policy

STATEMENT OF CLAIM: Claim on behalf of Foreman J. W. Vaughn requesting removal of a Formal Reprimand and one-year review period with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft. The Board makes the following additional findings.

Claimant has been employed by the Carrier since March 7, 2005. On July 25, 2011, he was assigned to Gang TSEC0801 as Foreman on the Fort Worth Sub. In that capacity, Claimant was distressing a rail at MP 409.2 but failed to mark the rail joint properly. He was observed by a Carrier official.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of Engineering Instruction 6.1.5 (Rail Removal Procedure) and assessed him a formal reprimand.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the facts and testimony presented at the investigation make it clear that

Claimant failed to mark the rail properly. Claimant admitted at hearing that he had not signed the rail at MP 409.2. BNSF contends that, when an employee admits guilt, there is no need for further proof.

As to the Organization's argument - that the charge was too vague to be addressed and, therefore, BNSF failed to comply with Rule 13 and Appendix 11 of the agreement - the Carrier asserts that BMWE failed to prove its contention. It points out that Claimant was given a fair and impartial investigation before being issued discipline and that the investigation notice and discipline were both issued timely. It contends, in addition, that the notice was not vague, noting that it contained sufficient information for Claimant's representative to prepare a defense.

With respect to the penalty, BNSF maintains that the discipline imposed is appropriate and that leniency is not in the Board's discretion.

The Carrier urges that the claim be denied as without merit.

The Organization argues that, at hearing, the Carrier confused the issues by entering multiple rules that conflicted with each other and which a Carrier Officer could not distinguish. It contends that it objected to the Notice of Investigation as vague, ambiguous and lacking in specific rule violations, leading to a biased and unfair environment at hearing. It asserts that, as a result, Claimant's representative was put at a distinct disadvantage. It asserts, therefore, that the Carrier failed to comply with Rule 13 and Appendix No. 11 of the Parties' Agreement.

With respect to the merits of the discipline, BMWE argues that two Carrier witnesses acknowledged that the rail in question was "snaky," indicative of an emergency condition, and that Claimant also believed that an emergency condition existed. It maintains that, according to the "Track Stability Field Manual" (p. 38), "When evidence of compressive stress in the rail indicates that the track may buckle ("snaky rail"), an emergency condition exists." The Organization contends that, in such situations, the rail is to be cut immediately to relieve the stress, without "consider[ing] whether the rail can be de-stressed properly according to these instructions." It asserts, therefore, that Claimant was acting reasonably under the circumstances and in the Carrier's best interest.

The Organization argues that the Carrier failed to prove the charges against Claimant and that, even if had sustained the allegations, the discipline is excessive. It maintains, therefore, that the discipline is arbitrary, excessive and unwarranted.

The Organization urges that the Claim be sustained, that Claimant's Formal Reprimand and one-year review period be removed from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

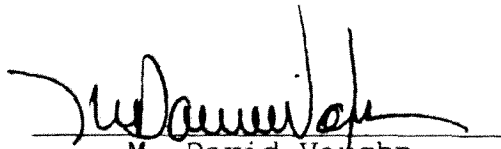
DISCUSSION AND ANALYSIS: There is no dispute that EI 6.1.5 requires the employee in charge of a rail removal job to mark the rail - noting the rail added location and the exact amount of rail removed, among other things - when a portion of rail is removed. The evidence is sufficient to persuade the Board that Claimant was the employee in charge of the job at issue and that he failed to mark the rail; he admitted that he did not do so.

The Board has carefully considered, but is not persuaded by, the Organization's challenges to the validity of the investigation. In addition, the Board is not persuaded by BMWE's suggestion that an emergency condition existed, a condition that would, if proven, eliminate Claimant's need to follow the requirements of EI 6.1.5. Although two Carrier witnesses testified that, hypothetically, the presence of "snaky" rail could indicate the existence of an emergency condition, they did not testify that the conditions at MP 409.2 on July 25, 2011, constituted such an emergency. In addition, when Assistant General Chairman Brian Poston asked Claimant "why did you not make the match marks," Claimant stated that the "paint stick I was using had run out, and I had no more paint to mark the rail with." (Tr. 27) Although at the very end of Claimant's testimony Mr. Poston got Claimant to say "yes" to the question whether he "believe[d] that an emergency situation existed" (Tr. 34), the Board is convinced that his initial explanation - that he had run out of paint - is the actual reason he did not mark the rail.

Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of a Formal Reprimand and one-year review period was within the range of reasonableness. The Award so reflects.

AWARD: The Claim is denied. The Carrier met its burdens to prove Claimant guilty of the charges and to prove his Formal Reprimand to have been an appropriate penalty.

Dated this 18 day of March, 2013.


M. David Vaughn,
Neutral Member


Carrier Member
Ms. Samantha Rogers


Employee Member
Mr. David Tanner